

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

CITY OF BOSTON)

and)

SPRINT NEXTEL CORPORATION)

Relating to Rebanding Issues in the)
800 MHz Band)

DOCKET FILE COPY ORIGINAL
PS Docket No. 07-69

FILED/ACCEPTED

OCT 30 2007

Federal Communications Commission
Office of the Secretary

Mediation No. TAM-11155

To: Office of the Secretary
Attention: Chief Administrative Law Judge

**NEXTEL COMMUNICATIONS, INC.'S REPLY TO BOSTON'S
OPPOSITION TO MOTION TO ENLARGE ISSUES**

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits its Reply to the "Comments and Opposition to Motion to Enlarge Issues" ("Boston Opposition") filed by the City of Boston ("Boston") on October 26, 2007. Boston's Opposition is without merit and it does not represent a good faith attempt by Boston to reach a compromise settlement, as discussed herein. Nextel renews its request that the presiding officer hold a conference with the parties prior to the resumption of the hearing, so that the parties can use their time and resources completing the Frequency Reconfiguration Agreements ("FRAs"), rather than preparing for a hearing where the issues originally designated for hearing have, in fact, been resolved.

In its Opposition, Boston makes the overbroad and unsupported suggestion that Nextel knew that Boston's outside counsel would present stale and highly excessive legal hours to

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Nextel at the eleventh hour.¹ While Nextel might reasonably have expected that some additional *incremental legal hours would have been expended during the last days of mediation*, in fact, Nextel had no warning that the number of hours allegedly spent by Boston's counsel and presented now in addition to those already expended – already reflected in the draft FRAs as presented to the presiding officer and the Enforcement Bureau – would be so high and so totally outside the scope of what could be considered a reasonable amount of legal effort consistent with the 800 MHz program parameters.

Boston suggests that its delay in providing its later stage mediation legal costs to Nextel was somehow justified as it was “prior to the Commission’s decision regarding whether post-mediation legal costs would be subject to reimbursement.” This suggestion is inaccurate, however, as the terms of the Commission’s orders governing 800 MHz reconfiguration have always provided that 800 MHz licensees such as Boston are eligible for the reimbursement of their reasonable and prudent expenses of reconfiguration, including legal fees incurred during mediation, but not for reimbursement of their post-mediation litigation expenses.² The

¹ Boston’s Comments and Opposition to Motion to Enlarge Issues, PS Docket No. 07-69, 1 (filed Oct. 26, 2007) (“Boston Opposition”).

² See *Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, ¶ 178 (2004) as amended by *Erratum*, 19 FCC Rcd 19651 (2004) and *Erratum*, 19 FCC Rcd 21818 (2004) (“800 MHz Report and Order”), *aff’d sub nom. Mobile Relay Associates et al. v. FCC et al.*, 457 F.3d 1 (D.C. Cir. 2006) (stating that parties to mediation would share the cost of post-mediation arbitration, warning parties of the potentially substantial costs of post-mediation litigation before the Commission, and recommending that “[p]arties may therefore wish to consider possibly less burdensome and expensive resolution of their disputes through means of alternative dispute resolution.”). See also *Improving Public Safety Communications in the 800 MHz Band*, Second Memorandum Opinion and Order, 22 FCC Rcd 10467, ¶¶ 43-49 (2007) (“*Second MO&O*”) (denying petition for reconsideration and reiterating “that licensees are responsible for their own costs of filing and prosecuting requests for *de novo* review of disputed issues and the costs of pursuing any subsequent administrative or judicial review”); Wireless

Recommended Resolutions in this matter were referred to the Public Safety and Homeland Security Bureau for resolution on July 31, 2006 and October 10, 2006, respectively. Thus, the additional legal fees Boston's counsel now seeks to recover were fixed and knowable over a year ago.³ Putting issues of timely presentation aside, Nextel has a duty to determine whether the proposed reimbursement is valid under the 800 MHz program rules and policies, which prohibit the payment of unreasonable or unjustified legal fees.⁴ While Nextel could have entertained some additional amount of legal fees representing Boston's external counsel's time and efforts, the amount of additional time presented is not commensurate with the late stage mediation legal effort actually required and is not reasonable by any rational measure.

Additionally, Boston's assertion that its additional legal fees reportedly accrued over a year ago should first be the subject of mediation and then review by the Public Safety and Homeland Security Bureau is unsound. The issue is plainly in dispute as the sole item preventing the parties from signing FRAs, and the presiding officer may order whatever discovery is necessary to develop a factual record sufficient to decide the issue. This argument

Telecommunications Bureau Reminds 800 MHz "Wave One" Channel 1-120 Licensees of Band Reconfiguration and Mediation Obligations, Public Notice, 20 FCC Rcd 20561, 20562 (WTB 2005) ("However, licensees who fail to reach a mediated agreement must bear their own costs associated all [sic] further administrative or judicial appeals of band reconfiguration issues, including *de novo* review by PSCID and appeal of any such review by an ALJ.").

³ In fact, the information Boston's counsel has now submitted to Nextel regarding his total hours expended indicates that they were reportedly accrued from May 22, 2006 to September 19, 2006. Thus, the fees should have been fixed as of September 19, 2006.

⁴ As the Bureau has acknowledged, even proof that time has in fact been spent does not establish that costs are reimbursable under the program. *See* County of Chester, Pennsylvania and Sprint Nextel, WT Docket No. 02-55, DA 07-3287, ¶ 27 (July 18, 2007) ("We agree with Sprint Nextel that merely establishing that hours have been spent does not constitute proof that the hours were spent reasonably.")

also ignores the fact that the parties are already before the presiding officer to effect resolution of disputed issues.⁵

Further, Boston's assertion of a loss of "due process" rights that will allegedly be waived if the dispute is not subject to non-binding mediation is not serious. Whatever process is due Boston certainly may be afforded in this forum. It is remarkable for Boston, *the party that filed the petition for review*, to suggest now that a hearing before an Administrative Law Judge somehow does not provide sufficient process to safeguard Boston's interests. Similarly, given the fact that the parties are before the presiding officer only because Boston filed a petition for review of the underlying Bureau order, Boston's newfound concern over the "delay and expense inherent in continuing litigation" rings hollow.⁶

Finally, Boston's request that the presiding officer "direct Nextel down the path of immediate negotiation" is misleading.⁷ As Boston knows, a Nextel representative conveyed to Boston's counsel an offer to pay a part of the disputed legal fees so as to move this matter to a conclusion, only to be told flatly that the fees in question would not be subject to any reduction. It is not obvious what Boston means by "negotiation" based on its response to attempted

⁵ Boston's reference to an unspecified "Commission[]" finding in its rebanding Orders that repeatedly state the Commission's belief that mediation will expedite the pace of negotiations" is inapposite. Boston Opposition at 2. Whatever finding Boston is referring to does not contemplate a case where the parties are already before an Administrative Law Judge.

⁶ *Id.* at 3.


⁷ *Id.*

negotiation.⁸ Nextel remains willing to negotiate to resolve this issue, but cannot agree to pay *for legal hours that are plainly excessive, unjustified and unreasonable.*

Nextel renews its request that the presiding officer promptly convene a conference and, to the extent the presiding officer deems it either necessary or appropriate, enlarge the issues in this proceeding to include resolution of the amount of external legal fees to which Boston is entitled to reimbursement under the Commission's orders.

Respectfully Submitted,

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⁸ Boston also "sees no value" in a conference before the presiding officer. *Id.* Thus, Boston will not entertain any adjustment of the legal fees in dispute, nor will it agree to a proposed conference to discuss the substance of the dispute. It is unclear how Boston envisions this matter being resolved short of blanket acceptance by Nextel of Boston's newly presented legal fees.

CERTIFICATE OF SERVICE

I, *Patrick R. McFadden*, herby certify that on this 30th Day of October, 2007, a true copy of the foregoing "Nextel Communications, Inc.'s Reply to Boston's Opposition to Motion to Enlarge Issues" was served via first class, postage paid United States Mail upon the following:

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